Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
America's Carriers Telecommunication Association ("ACTA")	)	RM-8775
	)	
Petition for Declaratory Ruling, Special Relief and Institution of Rulemaking	)	

REPLY COMMENTS OF
THE BUSINESS SOFTWARE ALLIANCE

The Business Software Alliance ("BSA"), by its undersigned counsel and pursuant to Section 1.405 of the Federal Communications Commission's ("FCC" or "Commission") Rules, hereby respectfully submits the following Reply to the Petition for Declaratory Ruling, Special Relief and Institution of Rulemaking of America's Carriers Telecommunication Association ("ACTA Petition").

I. INTRODUCTION AND SUMMARY

In its initial opposition, BSA demonstrated that in the interest of maintaining continued growth, innovation, and competition in the software and Internet industries, the Commission should deny ACTA's Petition and decline to regulate software publishers or the Internet, especially where such regulation is unnecessary and inconsistent with the objectives and goals of the Telecommunications Act of 1996 ("1996 Act"). In its review of the initial comments of third parties, BSA found an overwhelming concern that Commission regulation of either software publishers or

the Internet could significantly impede the growth and development of new technologies and computer applications. Similarly, a majority of commenters provided strong support for BSA's position that software publishers, Internet Service Providers ("ISPs") and the Internet fall outside of the scope of the 1996 Act and may not be regulated by the FCC. Finally, a number of parties suggested that, in the event the Commission finds that it retains the authority to regulate the Internet -- which BSA maintains it does not -- the Commission should nonetheless refrain from subjecting such entities to regulation pursuant to its forbearance authority set forth in Section 10 of the Communications Act of 1934, as amended ("Communications Act"). Accordingly, as demonstrated by the vast majority of commenters, the Commission should deny ACTA's Petition in all respects and refrain from asserting jurisdiction over the Internet or the successful and innovative software publishing industry.

II. FCC REGULATION OF COMPUTER SOFTWARE PUBLISHERS OR THE INTERNET WILL STIFLE GROWTH AND INNOVATION AND IMPEDE THE FURTHER GROWTH AND DEVELOPMENT OF EDUCATIONAL APPLICATIONS.

As discussed in BSA's initial comments, growth and innovation in the computer software industry and in the use of the Internet have flourished in the absence of government regulation.[1/] According to NTIA, the Internet now connects more than 10 million computers, and this growth has created opportunities for entrepreneurs to develop, through software or other means, new applications such as video conferencing, multicasting, electronic payments, networked virtual reality,

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1/ Comments of BSA at 4-6.

and intelligent agents.[2] This "experimentation makes the Internet a dynamic testing ground for the kinds of innovative computer and communications concepts that bring tremendous benefit to society, in terms of both new services and more efficient versions of existing services."[3] The absence of regulation over publishers of software or ISPs in the United States has contributed to the United States' leadership, innovation and "preeminence in these fields."[4]

Moreover, as demonstrated by the comments of a number of parties, Commission regulation over software publishers or ISPs could have significant adverse effects upon these industries. For example, the Federal Networking Council ("FNC") found that regulatory intervention in the Internet's evolution could have "significant detrimental effects" upon the development of the NII/GII and possibly "lead to an erosion in the United States' leadership in this important technology."[5] The Information Technology Industry Council ("ITI") concludes that granting the relief requested in the ACTA Petition would "stifle the growth of the Internet and slow the emergence of new applications." Furthermore, NTIA concludes that the "Commission should not risk stifling the

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[2] *See also*, Comments of ITI at 9 (stating the Internet "is proving to be an unmitigated success -- in large part due to its unregulated nature and its ability to respond rapidly to changing consumer demands and rapidly changing technology").

[3] *See, e.g.*, Comments of the VON Coalition at 11.

[4] *Id.* For example, both the Internet and voice over the Internet can be used to facilitate communications among millions of people in "innovative ways that open entirely new opportunities for personal and business communications, entertainment, education, health care, and other uses." *Id.* at 10.

[5] Comments of Federal Networking Council at 2, 3.

growth and use of this vibrant technology in order to preserve undemonstrated harm to long distance service providers."[6/]

Similarly, numerous parties commented that regulation of the Internet may impede the advancement of U.S. educational goals. For example, Educom comments that although higher education is a major user of software and the Internet, with fifteen million students and several million faculty and staff already "on-line," the continued unfettered growth and development of the Internet and the software necessary to drive "fully digital, multimedia Internet services" is critical to the success of efforts to increase access to higher education.[7/] The Federation of American Research Networks ("FARNET") found the ACTA petition inconsistent with "allowing our nation's school children to communicate in real-time . . . in ways that school budgets have never been able to allow to take place before."[8/] Likewise, Cornell University expressed its concern that regulation of the Internet or software publishers would impede development of CU-SeeMe, a free video conferencing program that is part of the "Global SchoolNet Foundation and therefore, plays a role in electronically linking school children from around the world."[9/] Indeed, even many of the RBOCs and Interexchange carriers, while expressing concern over the current access charge structure,

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[6/] *See also,* Comments of the Computer Professionals for Social Responsibility and the Benton Foundation (stating that regulation of the Internet "would entangle the [world wide] web in a myriad of regulation and would be detrimental to the Internet and the technology"); Comments of Compuserve at 15 (cautioning that regulation will "stifle the Internet's current dynamism as the government will supplant consumers in the role of picking marketplace winners [and will] be seen as precedent by the States and by foreign administrations to do likewise").

[7/] *See* Comments of The VON Coalition at 5 (citing Comments of Educom).

[8/] Comments of FARNET at 3.

[9/] *See generally* Comments of Cornell University.

reached the conclusion that "enjoining deployment of a technology does not seem consistent with the Commission's statutory requirement to do its utmost to encourage new technological development."[10/]

Accordingly, in the interest of preserving the thriving, competitive, and successful U.S. software and Internet industries, as well as in the interest of promoting increased use of software and the Internet for the advancement of education, the Commission should refrain from regulating software publishers, ISPs and the Internet.

III. NEITHER SOFTWARE PUBLISHERS NOR ISPs ARE "TELECOMMUNICATIONS CARRIERS" SUBJECT TO THE JURISDICTION OF THE FEDERAL COMMUNICATIONS COMMISSION

BSA and other parties' initial comments also focused upon the definition of "telecommunications carrier" under the 1996 Act. In order to be considered a telecommunications carrier, software publishers and ISPs would have to offer telecommunications and engage in the transmission of information between points, for a fee to the public.[11/] Most commenters, however, found it indisputable that software publishers cannot possibly be considered to be

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[10/] *See, e.g.* Comments of US West.

[11/] In order to be classified as a "telecommunications carrier" under the Communications Act, an entity would have to engage in the provision of telecommunications services and thereby "offer[] telecommunications for a fee directly to the public. . ." 47 U.S.C. § 3. Telecommunications, in turn, is defined as the transmission of information: (1) "between or among points specified by the user," (2) "of the user's choosing," and (3) "without change in the form or content of the information a sent and received." BSA underscores the notion, however, that even in instances where a product offering constitutes "telecommunications," the offering may not necessarily be subject to regulation by the FCC under the Act unless the product is also offered to the public and for a fee. Accordingly, the 1996 Act does not disturb Commission precedent that telecommunications offered on a private basis remains outside the scope of the FCC's jurisdiction.

telecommunications carriers because they simply do not engage in the transmission of information.[12] Accordingly, because software publishers do not offer "telecommunications," and cannot therefore be considered to be either providers of "telecommunications services" or "telecommunications carriers" under the Communications Act, there is no basis for ACTA's assertion that the FCC may exercise jurisdiction over certain software publishers.[13]

Similarly, BSA and other parties demonstrated in their initial comments that ISPs similarly cannot be subject to FCC jurisdiction because they provide an "interactive computer service," not a "telecommunications service" under the definition included in the 1996 Act.[14] Indeed, Congress made clear in the 1996 Act that the Internet is to remain unregulated by declaring it to be "the policy

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[12] *See, e.g.*, Comments of Netscape at 20 (stating that "the Commission enjoys no statutory jurisdiction over computer software providers . . . which *enable*[] communication. The 1996 Act's definition of 'telecommunications service' makes plain that software providers are not carriers because they do not offer 'telecommunications for a fee,' but rather sell software products.); Comments of ITI at 5-7 (stating that as "access software" providers, software providers cannot be considered "telecommunications carriers"); Comments of Information Technology Association of America at 5 (noting that "Internet telephone software vendors do not provide a service, much less transmission capacity for the movement of 'information of the user's choosing."); Comments of Compuserve at 6 (stating that "examination of the new statutory provisions demonstrates that the computer software products at issue do not fit within the statutory definitional framework. . . to state the obvious . . . they do not provide any transmission services, and, thus do not provide 'telecommunications.').

[13] *See, e.g,* Comments of MFS at 4-5; Comments of Pacific Bell and Nevada Bell at 4-6 (stating that regulation of software providers would appear to constitute regulation of CPE and information service providers and such regulation would be a major step backward.); Comments of National Telephone Cooperative Association (software vendors are not common carriers); Comments of AT&T Corporation at 2-4 (software vendors are not "carriers" under the 1996 Act).

[14] *See e.g.*, Comments of BSA at 7-10 (noting that "Congress clearly intended to exclude providers of 'interactive computer services' from any FCC regulation [as] telecommunications carriers"); Comments of the VON Coalition at 14-16; Comments of the New Media Coalition for Marketplace Solutions at 4-6; Comments of ITI at 4-7; Comments of Compuserve at 12.

of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[15/] Accordingly, as a number of parties noted, it would be antithetical to the goals of the 1996 Act for "one of the Commission's first actions after passage of this pro-competitive statute [to be] to regulate the now unregulated world of the Internet."[16/]

IV. FORBEARANCE FROM REGULATION OF THE INTERNET OR SOFTWARE PUBLISHERS IS APPROPRIATE

Numerous parties also argued in their initial comments that, under Section 10 of the 1996 Act, the Commission's power to apply forbearance is mandatory where regulation "is not necessary to ensure that the charges, practices, classifications, or regulations by, for or in connection with a carrier, service or class of carrier or services are just and reasonable and are not unjustly or unreasonably discriminatory."[17/] Section 10 of the Act demonstrates Congress' intent to ensure that unnecessary regulation -- regulation which is not necessary to ensure nondiscriminatory and

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15/ Telecommunications Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 56 (1996).

16/ *See, e.g.,* Comments of Microsoft at 3. Apart from whether the Commission may regulate the Internet under the 1996 Act, numerous parties brought to light the practical impossibility of FCC regulation of services provided over the Internet. *See, e.g.,* Comments of BBN at 6 (stating that ISPs are not equipped to differentiate between digital bits that support differing applications); Comments of Center for Democracy and Technology (stating that implementation of the relief requested in the ACTA Petition would require the Commission to regulate otherwise indistinguishable data packets); Comments of Netscape at 16-18 (noting that regulation of services provided via the Internet would present difficult and potentially insoluble technical problems).

17/ 47 U.S.C. § 10(a)(1)-(3). *See* Comments of Netscape at 14. *See also*, Comments of Microsoft at 5; Comments of FARNET at 3.

reasonable rates or to protect consumers -- and the associated costs, not be imposed on thriving, competitive industries.

As noted in BSA's initial comments, the highly competitive software publishing and Internet industries are experiencing tremendous growth simply because they offer an array of services at competitive prices.[18/] This growth, in turn, has served to further catalyze innovation, lower prices, and the introduction of new services to customers. Indeed, as reflected in the comments of other parties, regulation of the Internet industry would actually disserve the public interest by potentially discouraging new entrants and placing regulatory conditions upon innovation, as well as raising the costs of the products being brought to market. Accordingly, because regulation of the Internet or software publishers is plainly inconsistent with the underlying intent of Section 10, ACTA's Petition should be dismissed.

However, should the FCC determine that it retains the authority to exercise jurisdiction over the Internet or Internet voice software -- which BSA adamantly maintains it does not -- the Commission is still not authorized to impose the Title II regulation on which the ACTA Petition is based. If for some reason the Commission deems it possible to classify the Internet, ISPs or publishers of certain software as "telecommunications carriers," the Commission must, under the express language of its governing statute, nevertheless exercise its authority to forbear from regulation. Accordingly, BSA respectfully submits that the Commission refrain from asserting jurisdiction over software publishers, ISPs or the Internet insofar as such jurisdiction would be both inconsistent and impermissible under Section 10 of the Communications Act.

[18/] Comments of BSA at 2-3.

V. CONCLUSION

For the foregoing reasons, BSA urges the Commission to deny ACTA's Petition without further consideration. Regulation of software publishers or ISPs would impede the growth of new technology and new commercial markets as well as interfere with the advancement of U.S. educational goals. Further, by definition, neither software publishers nor ISPs provide "telecommunications service" and therefore may not be regulated as such. Similarly, the Internet is an "interactive computer service" and may not be regulated as a "telecommunications service" or common carrier service under the Communications Act. Lastly, should the Commission nonetheless determine that it retains jurisdiction over the Internet, ISPs or certain software publishers, the Commission is required to forbear from regulation.

Respectfully submitted,

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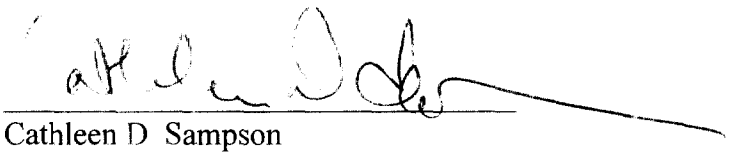
CERTIFICATE OF SERVICE

I, Cathleen D. Sampson, do hereby certify on this 10th day of June, 1996, that a copy of the foregoing Reply Comments of The Business Software Alliance, RM Docket No. 8775, was served via first-class mail on the parties named on the attached list.



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